Filed 6/12/19 P. v. Gordon CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROY GERALD GORDON, Defendant and Appellant.	A154614 (Contra Costa County Super. Ct. No. 05-152089-9)

Defendant Roy Gerald Gordon pleaded no contest to all charges pending against him and admitted all enhancement allegations. He was sentenced to 36 years, eight months in prison.

On appeal, Gordon contends, first, he is entitled to remand to allow the trial court to exercise its newly-authorized sentencing discretion under Senate Bill No. 1393 (2017–2018 Reg. Sess.) (S.B. 1393) and, second, the trial court erred in imposing certain enhancements based on his prior conviction of first degree residential burglary because the burglary occurred after Gordon committed many (but not all) of his current offenses.

We will remand for resentencing under S.B. 1393. We reject Gordon's second contention, but we also will remand to allow the trial court to consider whether the three-year term imposed under Penal Code[1] section 667.5, subdivision (a), for Gordon's prison term served for a 2009 burglary is appropriate. The issue turns on whether Gordon

[1] Further undesignated statutory references are to the Penal Code.

committed a "violent" felony under section 667.5, subdivision (c), after the 2009 burglary occurred. The parties are granted leave to argue the issue on remand.

FACTUAL AND PROCEDURAL BACKGROUND

In a first amended information, the Contra Costa District Attorney charged Gordon with conspiracy to commit human trafficking (§§ 182, subd. (a)(1), 236.1, subd. (b); count 1), torture upon Victim Three (§ 206; count 2), two counts of mayhem upon Victim Three (§ 205; counts 3 and 5), kidnapping for extortion of Victim Three (§ 209, subd. (a); count 4), two counts of forcible oral copulation of Victim Three (former § 288a, subd. (c)(2), as amended by Stats. 2013, ch. 282; counts 6–7), dissuading a witness (Victim One) by force or threat (§§ 136.1, subd. (c)(1); 1192.7, subd. (c)(37); count 18), and conspiracy to dissuade a witness (§§ 136.1, subd. (c)(2); 1192.7, subd. (c)(37); count 19).[2] It was alleged Gordon personally used a firearm (§ 12022.53, subd. (b)) in the commission of counts 2 and 3.

In addition, Gordon was alleged to have been convicted of two prior felonies: first degree residential burglary committed in 2009 and grossly negligent discharge of a firearm in 1991. It was alleged that the two prior convictions were serious felonies under section 667, subdivision (a)(1), and strikes under section 667, subdivisions (d) and (e), and that the 2009 residential burglary was a violent felony for which he had served a prison term under section 667.5, subdivision (a).

---

[2] The first amended information charged six defendants, including Gordon. In count 1, all six defendants were alleged to have conspired to commit human trafficking. In count 19, Gordon was alleged to have conspired with codefendants Derrick Damon Harper and Erick Rodney Beman to dissuade a witness.

We note that there were three principal victims described in the first amended information, and they were referred to variously as either "Victim # [number]" or "JANE DOE # [number]." We refer to the victims as "Victim One," "Victim Two," and "Victim Three." We also note that the second mayhem charge (count 5) had been dismissed pursuant to section 995 before the first amended information was filed, but it was realleged by mistake.

In February 2017, Gordon pleaded no contest to all charges and admitted all enhancement allegations. There was no indicated disposition, and the plea form Gordon signed and initialed provided that the maximum sentence he faced was "LIFE."

The sentencing hearing was held in April 2018. The prosecutor moved to dismiss counts 2 through 4, and she noted that count 5 previously had been dismissed pursuant to section 995. The trial court sentenced Gordon to 36 years, eight months in prison. The sentence consisted of the upper term of eight years for count 6 (forcible oral copulation); a consecutive upper term of eight years for count 7 (same) pursuant to section 667.6, subdivisions (d) and (e)(7)); four years, eight months (one-third the midterm) for count 1 (conspiracy to commit human trafficking); one year (one-third the midterm) for count 18 (dissuading a witness by force or threat); one year (one-third the midterm) for count 19 (conspiracy to dissuade a witness), all consecutive; plus 13 consecutive years of enhancements consisting of two five-year terms for Gordon's prior convictions of two serious felonies (§ 667, subd. (a)(1)) and a three-year term for his prior prison term for a violent felony (§ 667.5, subd. (a)).

DISCUSSION

A. *Remand for Resentencing Under S.B. 1393*

At the time he was sentenced in April 2018, the trial court had no discretion to strike or dismiss a five-year enhancement for a prior serious felony under section 667. (Former § 1385, subd. (b), as amended by Stats. 2014, ch. 137, § 1 ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667."].)

On September 30, 2018, the Governor signed S.B. 1393 which, effective January 1, 2019, amended sections 667 and 1385 to allow a court to exercise its discretion to strike or dismiss prior serious felony convictions for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*); Stats. 2018, ch. 1013, §§ 1–2.)

Gordon seeks remand for resentencing under S.B. 1393. The Attorney General concedes S.B. 1393 applies because the statute came into effect while Gordon's judgment still is not final on appeal (*Garcia, supra*, 28 Cal.App.5th at p. 973), but he argues

remand is unnecessary in this case, citing *People v. Johnson* (2019) 32 Cal.App.5th 26 (*Johnson*). In *Johnson*, the defendants were sentenced before S.B. 1393 and another sentencing law were enacted. (*Id*. at pp. 67–69.) The defendants sought remand for resentencing under the new laws, and the *Johnson* court observed, "We need not remand the instant matter if the record shows that the superior court 'would not . . . have exercised its discretion to lessen the sentence.' " (*Id*. at p. 69.)

Here, the Attorney General points to the trial court's decision not to exercise its discretion to strike the three-year prison prior enhancement under section 667.5, subdivision (a), and its decision to impose consecutive aggravated terms for counts 6 and 7 (forcible oral copulation). As to the aggravated terms, the prosecutor stated the People were requesting the upper terms for counts 6 and 7, which involved Victim Three, because the torture and aggravated mayhem charges (counts 2 and 3) and charge of kidnapping for extortion (count 5) involved the same victim and were dismissed (by the People after Gordon entered his no-contest plea to those charges). The trial court responded, "That seems to be an appropriate basis to the Court." The Attorney General argues it is clear based on this record that the trial court would not exercise its discretion to strike the enhancements under section 667, subdivision (a). We are not convinced.

In *Johnson*, cited by the Attorney General, the trial court remarked "that the enhancement, which was mandatory at that time, 'appears to me to be entirely appropriate' " as applied to defendant Johnson. (32 Cal.App.5th at p. 69.) With respect to codefendant Guthrie, the trial court in *Johnson* stated "that it 'ha[d] no discretion to strike' the serious prior and 'wouldn't strike if [it] did have discretion.' " Despite these statements by the trial court, the Court of Appeal remanded the matter for resentencing under later-enacted sentencing laws for both defendants. The *Johnson* court reasoned: "Although the trial court was not sympathetic to either Johnson or Guthrie, it is undisputed that the court had no discretion, at that time, to strike the firearm use enhancement or the serious prior felony enhancement, and neither defendants' trial counsel had the opportunity to argue the issues. The subsequently enacted laws provided the court with that discretion, greatly modifying the court's sentencing authority. Thus,

even with the court's statements during sentencing, out of an abundance of caution, we remand this matter for resentencing to allow the superior court to consider whether Johnson's firearm enhancement and Guthrie's serious prior felony enhancement should be stricken." (*Ibid*.)

We agree with the reasoning of *Johnson* and will remand for resentencing under S.B. 1393 in an abundance of caution. (See also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 428 ["nothing in the record rules out the possibility that the court would exercise its discretion" to strike an enhancement that was mandatory at the time of sentencing].) "[W]e express no opinion on how the court should exercise its discretion on remand, [which] is for it to exercise in the first instance." (*Ibid*.)

B. *Enhancements for Gordon's Prior Offense Committed in 2009*

Gordon also challenges the trial court's use of his prior conviction and prison term for first degree residential burglary to enhance his sentence.

In admitting the enhancement allegations, Gordon admitted he was convicted of first degree residential burglary that occurred on April 24, 2009 (2009 burglary) and he served a prison term for the conviction. The 2009 burglary conviction and prison term resulted in two enhancements: a five-year term under section 667, subdivision (a)(1), and a three-year term under section 667.5, subdivision (a).

In *People v. Rojas* (1988) 206 Cal.App.3d 795, 797 (*Rojas*), the appellate court held that a sentencing court may not impose a five-year enhancement pursuant to section 667, subdivision (a), for a prior conviction that occurred "after commission of the crime for which the defendant is presently being sentenced." Similarly, in *People v. Shivers* (1986) 181 Cal.App.3d 847, 849, the court held that an enhancement under section 667.5, subdivision (b), for a prior prison term may not be imposed where the prior prison term was for a crime committed after the commission of the crimes for which the defendant is currently being sentenced. The *Shivers* court reasoned that the enhancement statute's "purpose of deterring recidivism would not be effectuated by enhancing a present offense not yet committed." (*Id*. at p. 850.)

Gordon argues the enhancements for the 2009 burglary should not have been imposed because he was alleged to have committed the current crimes of forcible oral copulation (counts 6–7) between December 2007 and March 2008, and the 2009 burglary occurred *after* commission of those crimes.

Gordon's focus on when counts 6 and 7 occurred is misplaced. Our Supreme Court has explained there are two kinds of enhancements under section 1170.1 (governing sentencing for aggregate determinate terms): "(1) those which go to the nature of the offender; and (2) those which go to the nature of the offense. Enhancements for prior convictions . . . are of the first sort. The second kind of enhancements [are] those which arise from the circumstances of the crime, . . . Enhancements of the second kind enhance the several counts; those of the first kind, by contrast, have nothing to do with particular counts but, since they are related to the offender, are added only once as a step in arriving at the aggregate sentence." (*People v. Tassell* (1984) 36 Cal.3d 77, 90, overruled on another point by *People v. Ewoldt* (1994) 7 Cal.4th 380, 387; see *People v. Sasser* (2015) 61 Cal.4th 1, 10 [citing *Tassell* for the proposition there are two kinds of enhancements, those related to the offender and those related to the offense].)

The enhancements for Gordon's prior burglary conviction are of the first sort—enhancements that go to the nature of the offender. The enhancements do not attach to particular counts. Therefore, it does not matter that counts 6 and 7 occurred before the 2009 burglary because there were other offenses (for which Gordon was currently being sentenced) that occurred *after* the 2009 burglary. In count 1, Gordon conspired with his codefendants to commit human trafficking between January 2006 and April 2013. The conspiracy continued after Gordon's 2009 burglary. In count 18, Gordon used an express or implied threat of force or violence to dissuade Victim One from making a report to the police of her victimization; in count 19, he conspired with codefendants to dissuade Victim One from being a witness, and these offenses occurred on or about April 2013. Again, Gordon committed these crimes after the 2009 burglary.

In his reply, Gordon argues "the vast majority of the criminal conduct alleged was pled as occurring *before* the burglary in 2009." This is not a satisfactory response. The

enhancements at issue go to the nature of the offender, not the nature of the offense. Had Gordon been convicted of counts 1, 18, and 19 only, there would be no question that the offenses occurred "after commission of the crime for which the defendant is presently being sentenced." (*Rojas*, *supra*, 206 Cal.App.3d at p. 797.) It makes no sense to argue that the additional crimes (counts 2–4, 6–7) he committed before the 2009 burglary should insulate Gordon from the enhancements he is subject to because of the crimes he committed *after* the burglary (counts 1, 18, 19).

We do note, however, that section 667.5, subdivision (a), which was the basis for an additional three-year term, requires that "one of the new offenses is one of the violent felonies specified in subdivision (c)." Counts 6 and 7 for forcible oral copulation are violent felonies (§ 667.5, subd. (c)(5)), but these offenses did not occur after the 2009 burglary. (See *People v. Shivers*, *supra*, 181 Cal.App.3d at p. 849 [enhancement for prison prior cannot be imposed where prison prior term is for a crime the defendant committed after commission of the crimes currently being sentenced for].) Counts 1 (conspiracy to commit human trafficking), 18 (dissuading a witness), and 19 (conspiracy to dissuade a witness) occurred after the 2009 burglary, but they do not appear to qualify as violent felonies. Because we are already remanding for resentencing under S.B. 1393, we will also remand for consideration of whether a three-year enhancement under section 667.5, subdivision (a), or a one-year enhancement under section 667.5, subdivision (b), applies to the prison term Gordon served for the 2009 burglary. The parties are granted leave to argue the issue on remand.

DISPOSITION

The matter is remanded for resentencing pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by S.B. 1393, effective January 1, 2019, and for consideration of whether a three-year term or a one-year term under section 667.5 is an appropriate enhancement for Gordon's prison prior for the 2009 burglary. The parties are granted leave to argue on remand which enhancement applies to the prison prior for the 2009 burglary. The judgment is otherwise affirmed.

_____
Miller, J.

We concur:

_____
Richman, Acting P.J.

_____
Stewart, J.

A154614, *People v. Gordon*